

Delaware County Industrial Painting, Inc. and International Brotherhood of Painters and Allied Trades, Painters Local Union No. 201. Case 3-CA-16652

February 14, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge filed by the International Brotherhood of Painters and Allied Trades, Painters Local Union No. 201 on October 18, 1991, the General Counsel of the National Labor Relations Board issued a complaint against Delaware County Industrial Painting, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On January 13, 1992, the General Counsel filed a Motion for Summary Judgment. On January 15, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Regional Director, by certified letter dated December 19, 1991, notified the Respondent that unless an answer was received by the close of business on December 26, 1991, summary judgment would be sought.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. JURISDICTION

The Respondent is a New York corporation with its principal office and place of business in the Town of Grand Gorge, New York, where it is engaged as a painting contractor in the building and construction industry. During the 12 months preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$50,000, of which an amount in excess of \$50,000 was derived from providing services to other enterprises which are directly engaged in interstate commerce such as U. W. Marx, Inc. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Recognition

On or about May 1, 1989, the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit set forth below by entering into a collective-bargaining agreement with the Union for the period May 1, 1989, to April 30, 1991, succeeded by an agreement for the period May 1, 1991, to April 30, 1993, without regard to whether the majority status of the Union has ever been established under the provisions of Section 9 of the Act.

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen, painters, tapers, paperhangers, apprentices, and or any person who uses the tools of the trade other than the principal owner.

For the period of May 1, 1989, to April 30, 1993, based on the principles established in *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988), the Union has been and is the limited exclusive collective-bargaining representative of the unit.

B. Refusal to Bargain

Since on or about April 1, 1991, and continuing thereafter, the Respondent has failed to continue in full force and effect all the terms and conditions of the agreements referred to above by failing to abide by the following provisions:

Article 8, (Benefit Funds)

Article 9, (Delinquent Contractors)

Article 20, (Apprenticeship and Training Program)

The terms and conditions of employment of the agreements the Respondent failed to continue in full force and effect, as described above, are mandatory subjects of bargaining.

CONCLUSIONS OF LAW

1. By the acts described above, the Respondent has failed and refused, and is failing and refusing to bargain collectively with the limited exclusive representative of its employees and thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

2. By its failure on and after April 1, 1991, to continue in full force and effect all the terms and conditions of the collective-bargaining agreements, by failing to abide by article 8 (Benefit Funds), article 9 (Delinquent Contractors), and article 20 (Apprenticeship and Training Program), the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make all contractually required payments it failed to make since April 1, 1991.¹

The Respondent shall also make its employees whole for any losses attributable to its failure to make the contractually required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Delaware County Industrial Painting, Inc., Town of Grand Gorge, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Painters and Allied Trades,

Painters Local Union No. 201, as the limited exclusive representative of its employees in the bargaining unit, by failing to abide by articles 8, 9, and 20 of the collective-bargaining agreements with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Continue in full force and effect all the terms and conditions of the collective-bargaining agreement with the limited exclusive collective-bargaining representative of the employees in the following appropriate unit:

All journeymen, painters, tapers, paperhangers, apprentices, and or any person who uses the tools of the trade other than the principal owner.

(b) Make all contributions required under articles 8, 9, and 20 of the collective-bargaining agreements with the Union, as provided in the remedy section of this decision.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contributions required by articles 8, 9, and 20 of the collective-bargaining agreements with the Union, as provided by the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in the Town of Grand Gorge, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹ Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Painters and Allied Trades, Painters Local Union No. 201, as the limited exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeymen, painters, tapers, paperhangers, apprentices, and or any person who uses the tools of the trade other than the principal owner.

WE WILL NOT fail or refuse to continue in full force and effect all the terms and conditions of the agreements by failing to abide by article 8 (Benefit Funds), article 9 (Delinquent Contractors), and article 20 (Apprenticeship and Training Program).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all the terms and conditions of the collective-bargaining agreement with the Union.

WE WILL make all contributions required by articles 8, 9, and 20 of the collective-bargaining agreements with the Union and abide by these terms of the agreements.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to abide by articles 8, 9, and 20 of the collective-bargaining agreements with the Union, with interest.

DELAWARE COUNTY INDUSTRIAL
PAINTING, INC.